

FCC MAIL SECTION

Before the
Federal Communications Commission
Washington, D.C. 20554

JUL 11 4 10 PM '94

MM Docket No. 94-72 ✓

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations,
(Odessa and Los Ybanez, Texas)

RM-8479

**NOTICE OF PROPOSED RULE MAKING
AND
ORDER TO SHOW CAUSE**

Adopted: June 23, 1994;

Released: July 8, 1994

Comment Date: August 31, 1994

Reply Comment Date: September 18, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Ruben Velasquez ("petitioner"), permittee of Station KADM-FM, Channel 299C2 at Odessa, Texas, requesting substitution of Channel 300C1 for Channel 299C2 at Odessa and modification of Station KADM-FM's construction permit to specify operation on the higher powered channel. To accommodate the upgrade at Odessa, petitioner also requests the substitution of Channel 253C2 for Channel 300C2 at Los Ybanez, Texas. Petitioner states that he will apply for Channel 300C1, if allotted.

2. In support of his proposal, petitioner states that the site restriction presently imposed on Channel 299C2 at Odessa, prevents him from providing Odessa with the requisite city grade signal. Petitioner contends adoption of his proposal would cure the service deficiency while providing service to an additional 116,510 persons. Petitioner notes that his channel substitution proposal at Los Ybanez does not require a change of transmitter site for Station KYMI-FM. Petitioner acknowledges his responsibility to compensate the licensee of Station KYMI-FM for the reasonable expenses associated by changing channels at Los Ybanez.

3. We believe the public interest would be served by proposing the substitution of Channel 300C1 for Channel 299C2 at Odessa, Texas, and the substitution of Channel 253C2 for Channel 300C2 at Los Ybanez, Texas, since it could enable Station KADM-FM to improve its service to

the public. Channel 300C1 can be allotted to Odessa in compliance with the Commission's minimum distance requirements without the imposition of a site restriction.¹ Channel 253C2 can be allotted to Los Ybanez in compliance with the Commission's minimum distance separation requirements and can be used at Station KYMI-FM's license site.² To accommodate the upgrade at Odessa, we will direct an *Order to Show Cause* to the licensee of Station KYMI-FM why its license should not be modified to specify operation on Channel 253C2 in lieu of Channel 300C2. In addition, concurrence of the Mexican government has been solicited for these allotments since Odessa and Los Ybanez are located within 320 kilometers (199 miles) of the U.S.-Mexican border.

4. As requested, we also propose to modify the construction permit for Station KADM-FM at Odessa to specify operation on Channel 300C1. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest for the use of Channel 300C1 at Odessa or require petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

5. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

| City | Channel No. | |
|-------------------|---------------------------|---------------|
| | Present | Proposed |
| Odessa, Texas | 241C2, 245C1, | 241C2, 245C1, |
| | 250C1, ³ 256C, | 250C1, 256C, |
| | 299C2 | 300C1 |
| Los Ybanez, Texas | 300C2 | 253C2 |

6. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Israel Ybanez, licensee of Station KYMI-FM, Los Ybanez, Texas, SHALL SHOW CAUSE why its license SHOULD NOT BE MODIFIED to specify operation on Channel 253C2 as proposed herein instead of the present Channel 300C2.

7. Pursuant to Section 1.87 of the Commission's Rules, Israel Ybanez may, not later than August 29, 1994, file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Israel Ybanez to furnish additional information. If Israel Ybanez raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Israel Ybanez will be deemed to have consented to the modification as proposed in the

¹ The coordinates for Channel 300C1 at Odessa are North Latitude 31-51-30 and West Longitude 102-22-30.

² The coordinates for Channel 253C2 at Los Ybanez are North Latitude 32-43-22 and West Longitude 102-01-50.

³ We recognize that the Odessa upgrade to Channel 300C1 conflicts with the Channel 250C allotment at Odessa, Texas. However, by letter dated July 31, 1992, the FM Branch cancelled the expired construction permit (BPH-870226IM) for Sta-

tion KODM-FM, Odessa, Texas. No appeal of this cancellation has been received. Pursuant to the Commission's Public Notice entitled "Reclassification of FM Facilities Pursuant to BC Docket No. 80-90, 2 FCC Rcd 2124 (1987), the pre-Docket 80-90 allotment is automatically downgraded to the class of the licensed facility upon the expiration of a higher class construction permit. Consequently, the Commission has now downgraded KODM-FM's facility from Class C to C1.

Order to Show Cause and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

8. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Notice of Proposed Rule Making and Order to Show Cause* to Israel Ybanez, No. 15, Los Ybanez, Texas, 79331 (licensee of Station KYMI-FM).

9. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

10. Interested parties may file comments on or before **August 31, 1994**, and reply comments on or before **September 18, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John Wells King, Esq.
Haley, Bader & Potts
4350 North Fairfax Drive
Suite 900
Arlington, Virginia 22203-0606
(Counsel for petitioner)

11. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

12. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202)634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate

of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.